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In the Supreme Court
of the United States

OCTOBER TERM, 1964

No. 708

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Petitioners,

vs.

C. J. MONTAG & SONS, INC., CARL M. HALVORSON, INC., AUSTIN CONSTRUCTION CO., BABLER BROS., INC., and McLAUGHLIN, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This brief is filed on behalf of appellees-appellants in case No. 18875 below, hereinafter collectively called "respondents," in opposition to the petition for a writ of certiorari filed by petitioners, hereinafter sometimes referred to as "international union" and "Local 1849," respectively. References to the record filed here will be the

same as those used by petitioners; "MR" for references to the district court clerk's record containing the pleadings and other court papers, and "Tr." for references to the eight volumes of the record containing the reporters' transcript of the proceedings. All exhibit references will be to those filed in the "Montag" case.

QUESTIONS PRESENTED

In light of the record filed here and the opinion below, respondents do not believe that petitioners' statement of the questions presented is sufficiently precise. We believe the following is an accurate statement of the only questions raised which have any foundation in the record:

1. Whether work stoppages arising out of a demand by a union that an employer assign to its members part of a particular work task already assigned to members of a second union will support a judgment for damages under Sections 303(a)(4) and 303(b), Labor Management Relations Act, 1947, 29 U.S.C. §§ 187(a)(4) and 187(b), in respect of any period after the international presidents of the two unions have tentatively agreed that part of the work may be reassigned to members of the first union if it will not reduce the man hours of employment of members of the second union.

2. Whether a contract providing for arbitration of jurisdictional disputes between unions authorizes the arbitrator to divide a single work assignment between two unions in a manner which requires duplicate crews to perform a single work assignment.

STATEMENT OF THE CASE

The petition for a writ of certiorari is misleading as to the facts of this case because of certain important omissions. The material facts are accurately summarized in the opinion of the Court of Appeals for the Ninth Circuit, which is printed as Appendix A to the petition and reported at 335 F.2d 216. Additional facts will be cited hereinafter where necessary to a complete understanding of the issues.

At the outset, however, we wish to correct one misleading, although perhaps immaterial, implication in the petition. On page 6 petitioners couple a recital of testimony that respondents "had bid the job based on rigging the job by the use of Iron Workers" with a charge that in making the assignment respondents "disregarded" the Carpenters' submission of overwhelming evidence indicating they were entitled to the work. The intended implication of this statement, as indicated by the argument which follows, appears to be that respondents acted arbitrarily and in bad faith because they could do the work more cheaply with ironworkers than with carpenters.

There is no support in the record for such an implication. The uncontradicted evidence was that actually the work which was assigned to ironworkers could have been done more cheaply with carpenters because of lower wage scales (Tr. 885, 886). The testimony cited by petitioners concerning the manner of computing the bid (Tr. 151) had no relation to *which union* should per-

form the rigging work but was given as a reason why respondents could not afford to hire *duplicate* rigging crews. Furthermore, there was no issue in the case as to the good faith of respondents in making the assignment or as to its propriety. The parties stipulated and the court found that in assigning the work respondents proceeded in accordance with their construction of the "procedural rules and regulations of the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry" (MR 29, par. 8; MR 57, par. 8; Exhibit 26). This respondents were required to do by their contract with both unions. Although petitioners disputed the assignment (MR 58, par. 9), this was not important as to *respondents'* good faith because the union's responsibility provisions of the Procedural Rules forbade work stoppages and required the unions to remain at work and comply with the employer's assignment pending resolution of the dispute by the Joint Board (Exhibit 3, pp. 5-6, pars. 1, 2, 3 and 4).

ARGUMENT

I

The record here presents no new or important question involving the appropriate interpretation of section 303(a)(4), Labor Management Relations Act, 1947, but only a question of fact decided below adversely to petitioners' contentions.

An examination of the record filed here demonstrates that on two separate occasions the petitioners induced and encouraged the employees of respondents to engage in concerted refusals, in the course of their employment,

to work on materials with the object of forcing respondents to assign particular work to members of Carpenters' Local 1849 rather than to members of the Ironworkers' Union to whom respondents had previously assigned such work (MR 30, pars. 10, 11 and 12; MR 58-59, pars. 10, 11 and 12; MR. 60, par. 16). Such conduct is in clear violation of the plain language of Section 303(a)(4), Labor Management Relations Act, 1947.

However, petitioners argue that the plain language of Section 303(a)(4) should be ignored and that that section should be construed to apply only to a situation where there is an active and continuing dispute between two competing unions over which is entitled to perform certain work which an employer has assigned to one of them. They argue that no such dispute existed in this case, at least at the time of the September work stoppage.

Even if the facts here were that no such dispute existed, the issue which would thereby be raised was decided adversely to petitioners' contention in *International Longshoremen's Union, Etc.* v. *Juneau Spruce Corp.*, 342 U.S. 237, 72 S. Ct. 235 (1952), where this Court said (342 U.S. at p. 244):

> "The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by § 303(a)(4)."

In the same case this Court also pointed to the fallacy of petitioners' argument that the rights granted to parties under Sections 303(a)(4) and 303(b) should be

measured by the administrative remedies available under the unfair labor practice provisions of Sections 8(b)(4)(D) and 10(k), National Labor Relations Act, 29 U.S.C. §§ 158(b)(4)(D) and 160(k). This Court decided in *Juneau Spruce* and reaffirmed in *NLRB* v. *Radio & Television Broadcast Engineers Union*, 364 U.S. 573, 81 S. Ct. 330 (1961), that these sections present two distinct approaches to the problem of handling jurisdictional disputes and that no substantive symmetry between them is required.

Accordingly, although we agree with petitioners' statement on page 13 of the petition that the conduct proscribed by Sections 303(a)(4) and 8(b)(4)(D) is identical, we cannot agree with the conclusion which follows. The fact that a dispute proscribed by Section 8(b)(4)(D) is adjusted or resolved in the manner contemplated by Section 10(k), prior to the imposition of normal unfair labor practice sanctions, does not mean that such conduct is *ipso facto* removed from the type proscribed by Section 8(b)(4)(D). On the contrary, it merely means that the parties have effectively availed themselves of the remedy afforded by Section 10(k), a remedy which is entirely distinct from that afforded by Section 303(b).

In any event, even if it were deemed desirable to reconsider the question resolved by this Court in the above cases, this is not a proper case in which to do so because that issue here is wholly hypothetical. The court below decided this case on the basis of respondents' alternative argument that there was in fact an

active and continuing dispute of the type which petitioners assert is necessary. The uncontradicted evidence supports this conclusion in two particulars:

1. The evidence showed nothing more than a tentative agreement between the presidents of the two international unions conditional upon finding a way to give the work to the carpenters without taking it away from the ironworkers; and

2. Whatever the agreement of the presidents or representatives of the two international unions, there was never an agreement at the local level.

The undisputed evidence shows that the dispute was not settled at the time of or during the initial work stoppage in June (Exhibits 29, 31, 37; Exhibit 7, pp. 27-28). The record does not support petitioners' statement on page 7 of the petition that the evidence is in conflict as to whether the ironworkers conceded every issue in dispute on June 20. The so-called general rigging work on multipurpose cranes which was the work involved in the dispute here was clearly not resolved at the meeting on June 20 (Exhibit 5, pp. 34-35; Exhibit 40, p. 2; Exhibit 7, p. 31). In fact, the undisputed evidence was that even after the tentative agreement of the international presidents on August 27, 1957, which is relied on by petitioners, the Ironworkers' International representative refused to meet to place the "understanding" in effect (Exhibit 5, pp. 38-39) and was accused of stalling and "holding out" (Exhibit 47). As late as September 10, 1957, the day the second work stoppage commenced, he was still "awaiting confirm-

ation of the understanding" (Exhibit 49). Furthermore, the members of Ironworkers' Local 14 continued to perform the work and their business representative denied the existence of an agreement (Exhibit 50).

As late as September 18, 1957, eight days after the second work stoppage had commenced, petitioners' international president acknowledged that the so-called agreement was only a tentative agreement dependent upon an "equitable solution" and the maintenance of the "status quo insofar as man hours are concerned" (Exhibit 53). The Ironworkers concurred in this interpretation (Exhibit 54). Even after the second work stoppage was concluded, the members of Ironworkers' Local 14 continued to perform the work and the international representatives continued to attempt to work out an "equitable solution" (Exhibit 7, p. 46). It was not until November 14, 1957, that the international unions finally reached a definite agreement (Exhibit 8, p. 16; Exhibit 7, p. 46; Exhibit 9, p. 23). But not even then did this settle the dispute insofar as it concerned the members of Ironworkers' Local 14, who continued to perform the work despite the threat of disciplinary action by their international president (Exhibit 8, pp. 19-20).

As stated above, the court below concluded, on the basis of the foregoing evidence, that an active and continuing dispute existed between petitioners and the ironworkers over the work of rigging forms on multipurpose cranes. The court also concluded that even if there had been a definite agreement between the two unions to divide respondents' single work assignment between them, with petitioners taking the wood forms and the

ironworkers the metal forms, this would not have removed the dispute from the category of a jurisdictional dispute. The court said:

> "And the fact that the union which has the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes."

This conclusion is in accord with that of the National Labor Relations Board in similar situations arising under the unfair labor practice provisions of Sections 8(b)(4)(D) and 10(k), National Labor Relations Act. See, *Engineered Building Specialties, Inc.*, 144 NLRB No. 119 (1963); *Detroit Mailers Union No.* 4, 146 NLRB No. 23 (1964), and *Plumbers & Pipefitters Union (Bellezza)*, 149 NLRB No. 64 (1964).

It is, therefore, evident that the first point which petitioners seek to raise is not new, important or substantial and is, in fact, wholly hypothetical.

II

The Court below did not substitute its judgment for that of an arbitrator.

At the outset, we wish to point out that, in discussing their second point, petitioners again imply arbitrary action and bad faith by respondents in having assertedly "invoked the arbitral machinery of the Joint Board's procedures, but then refused to comply with that Board's award." Once again, to set the record straight on what may be an immaterial matter, what

respondents sought from the Board was to compel petitioners to comply with their contract that there would be no work stoppages due to jurisdictional strikes (Exhibits 28, 32 and 34). What petitioners describe as respondents' "refusal" to comply with the Board's order was, as shown by the evidence of both the union representatives and the employer, the inability after several months of effort to find any way to carry out the Joint Board's instructions that its award be executed in a manner not requiring duplicate crews (Tr. 888-892; Exhibit 5, pp. 54-56; Exhibit 7, pp. 39-41; Exhibit 9, p. 29). There was no contrary evidence except perhaps some vague hearsay testimony by deposition (Exhibit 9, pp. 56-57). Petitioners did not even attempt to prove that this could have been done and in fact the evidence of damages in support of their counterclaim assumed the necessity of duplicate crews. The refusal of the Ironworkers to have composite crews removed the only possible expedient by which the award could be complied with, without the necessity of duplicate crews (Exhibit 8, p. 8; Exhibit 11, p. 3; Exhibit 4, p. 8; Tr. 892).

Petitioners argue that when the court of appeals concluded that respondents had not breached the collective bargaining agreement with petitioners by failing to comply with the Joint Board award, it substituted its judgment for that of the Joint Board on a matter involving the merits of the dispute in disregard of this Court's decision in *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358 (1960). The decision in that case, however, supports the ruling below.

The Joint Board was founded for the express purpose of providing an orderly procedure for the processing and determination of jurisdictional disputes cognizable under Sections 8(b)(4)(D) and 303(a)(4), without work stoppages (Exhibit 3, p. 1; Exhibit 2, p. 5). The source of the Board's authority was the agreement of the parties that it should "consider and decide" any such disputes (Exhibit 2, p. 5, Sec. 3). The court of appeals acknowledged this fact when it held (335 F.2d at p. 223) that the parties had agreed to submit jurisdictional disputes to the Board only for the express purpose of having the dispute decided, not straddled. The scope of the submission agreement was, of course, a judicial question.

As the court pointed out, the Joint Board did not purport to decide which of two competing unions was entitled to the single work assignment of rigging on multipurpose cranes. Instead, the Board merely rubber stamped the agreement of the international unions to divide the work, with the proviso that this be done in a manner which would eliminate any possibility of duplicate crews or any accusation of featherbedding (Exhibit 9, pp. 38-39, 40-41, 43, 45). The net result was a self-contradictory award which was impossible of performance despite repeated efforts of all parties to comply with it. The Board's award was an attempt to divide the work between *both* unions and, therefore, exceeded its authority to *decide* the dispute. As mentioned above, the National Labor Relations Board has rejected the argument that jurisdictional disputes can be "decided" by the unions agreeing, over the protests of the employer,

to make two jobs out of one by dividing a single work assignment between them.

Respondents submit that the award here clearly exceeded the scope of the submission and the jurisdiction vested in the Board to decide jurisdictional disputes. Certainly, the court of appeals had not only the power but the duty to make this determination, as shown by this Court's decision in *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358 (1960), as follows:

> ". . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. . . . his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Accordingly, the court below did not usurp the Board's jurisdiction to decide the merits of the dispute. It decided only that the Board's method of disposition did not constitute a settlement of the dispute as authorized by the submission agreement.

CONCLUSION

The petition for a writ of certiorari presents no new or important question as to the interpretation of a federal statute. The decision below is not contrary to this Court's previous cases or those of any other circuit or of the National Labor Relations Board. The unique factual situation is of interest only to the parties here and

certiorari should not be granted to give petitioners a further review of facts already passed on by two federal courts.

The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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